F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

January 28, 1938

[APPELLATE CIVIL JURISDICTION]

ROGER HALL, C.J. (F.M.S.), McELWAINE, C.J. (S.S.), MURRAY-AYNSLEY, J.

RE CHOP CHEONG TUCK OF IPOH *EX PART* LEONG CHEONG WAI THE OFFICIAL ASSIGNEE OF THE PROPERTY OF CHOP CHEONG TUCK

(Appellant).

vs.

LEONG CHEONG WAI

(Respondent).

(PERAK CIVIL APPEAL No. 2 of 1938)

Bankruptcy Enactment (Cap. 55)—Limitation Enactment (Cap. 18)—Arts. 46, 86, 94 and 97—Partnership—Accumulated profits—Death of a partner—His share of profits—Subsequent bankruptcy of the firm—Probate debt.

A Chinese partnership business was begun in 1894. A, one of the original partners of the firm, continued to be a partner therein until his death on the 22nd October, 1922. At that date $326,952.43 stood in the firm's books to the credit of accumulated profits. A held 6 out of 156 shares in the partnership. A's son B took out Letters of Administration to the estate of his father A on the 3rd May, 1930. Having obtained Letters of Administration B applied in August, 1932 to the then managing partner of the firm for payment of A's share in the accumulated profits and on the latter's request B agreed to give the firm two years' time to pay. In August, 1934, B again applied for payment but was put off by promises to pay. The managing partner left the country in October 1934 and was succeeded in the management of the business by another partner who also promised to pay B the sum in a short time. On the 3rd May, 1935 a receiving order was made against the firm. On the 22nd December 1936 B filed a proof of his claim with the Assistant Official Assignee who rejected it on the following grounds:—

1. That if the share of the deceased partner (i.e. the Appellant's father Leong Chee Weng) was a debt due by the surviving partners, the claim was barred by Limitation.

2. If not, the claim was a claim for an account of a dissolved partnership, which was barred by Limitation.

3. And in any case, if the debt was not due by the surviving partners, the estate of a deceased partner could not prove in competition with the creditors of the firm.

On appeal from the decision of the Assistant Official Assignee the appeal was allowed by Aitken J. who held:—

(i) that B's claim was for a debt due by the surviving partners and for a sum certain, and not for an account.

(ii) Articles 46, 86 and 94 of the Limitation Enactment did not apply but that Article 97 did; and

(iii) Even if time had run against the debt under the Limitation Enactment it was still a debt provable in Bankruptcy.

The Assistant Official Assignee appealed to the Court of Appeal.

Held, by the Court of Appeal by a majority (Roger Hall, C.J. and Murray-Anysley, J. with McElwaine, C.J. (S.S.), dissenting) that on the evidence no issue of limitation arose.

Held, by McElwaine, C.J. (S.S.), that if the claim was barred by the Limitation Enactment the Official Assignee was entitled to reject the proof of it.

Mervyn Farr for the Assistant Official Assignee.

E. D. Shearn for the creditor appellant.

Aitken, J.—This is an appeal, by way of notice of motion, from a decision of the Assistant Official Assignee, Perak, rejecting a claim by one Leong Cheong Wai, as administrator of the estate of his deceased father Leong Chee Weng, against the bankrupt partnership firm of Chop Cheong Tuck for the sum of $12,575.09.

The facts out of which this claim arises are not in dispute, and appear to be as follows:—

The Chinese partnership business of Chop Cheong Tuck was begun at Ipoh so long ago as the year 1894. It was then described as a "Soo Chow and Hang Chow Sundry goods business", whatever that may mean, and though its original capital was only $20,400 contributed by some 22 partners, it prospered and flourished exceedingly. Branches were opened all over the Federated Malay States, in the Straits Settlements, in Hong Kong and even in China; and for over 30 years Chop Cheong Tuck increased its business and earned considerable profits for its partners.

The Appellant's father, Leong Chee Weng, was one of the original partners in the firm of Chop Cheong Tuck, and he continued to be a partner therein until his death on the 22nd of October 1922. At that date there was an item of $326,952.43 in the firm's books standing to the credit of nett accumulated profits, and as the deceased was holding 6 out of 156 shares into which the partnership was then divided, he was entitled to a 1/26th part of this sum of $326,952.43, which works out at the sum of $12,575.09.

At the time of his father's death the Appellant was working for Chop Cheong Tuck at its Gopeng branch, and was the sole beneficiary of his deceased father's estate. Nevertheless he delayed the taking out of Letters of Administration of the estate until

the 3rd of May 1930. According to his evidence before me such delay was due to ignorance on his part of the fact that this sum of $12,575.09 was due from the surviving partners of the firm to his father's estate until he saw a former annual balance sheet of the firm in the year 1929.

Having taken out Letters of Administration, the Appellant applied to the then manager of Chop Cheong Tuck for payment to him, as the legal personal representative of his deceased father, of this sum of $12,575.09. He was told that the firm was in financial difficulties, as the result of the world economic crisis, and asked to wait until conditions improved. He agreed to do so, and continued to wait until a Receiving Order was made against the firm on the 3rd of May 1935. It would be unfair, however, to draw any inference adverse to the Appellant from this delay; because he had set out the full amount of his claim, *i.e.* $12,575.09, in his petition for Letters of Administration and paid estate duty thereon. I see no reason whatever to doubt that $12,575.09 was due from the partnership firm of Chop Cheong Tuck to the Appellant's father Leong Chee Weng at the time of the latter's death; and this sum became due from the surviving partners of the firm to the Appellant, in his representative capacity, when he extracted Letters of Administration of his deceased father's estate on the 3rd of May 1930.

It must be admitted, however, that the Appellant has been very dilatory in the matter of this claim ever since his father's death. Not only did he wait nearly 8 years before he took out the necessary Letters of Administration, and then allow another 5 years to pass without making any serious attempt to obtain payment, but he also neglected to file any proof of his claim with the Assistant Official Assignee until the 22nd of December 1936, that is, more than 19 months after the Receiving Order was made. It is only reasonable to suppose that his position as an employee of Chop Cheong Tuck operated to restrain him from taking any active steps to enforce his claim, but I find it difficult to believe his statement that he did not realise he had to file a proof with the Assistant Official Assignee until 19 months had elapsed from the date of the Receiving Order. There is probably some other and better explanation of the delay in filing the proof of the Appellant's claim, but as he did not choose to give it no useful purpose will be served by any attempt on my part to supply one.

The Chop Cheong Tuck bankruptcy has certainly provided a vast amount of work for the Assistant Official Assignee at Ipoh, and the fact that he did not arrive at any decision in regard to the Appellant's claim of $12,575.09 until the 23rd of September 1937 does not indicate any lack of energy on his part. On that date he gave the Appellant notice that his claim had been rejected for the following reasons:—

"1. That if the share of the deceased partner (i.e. the Appellant's father Leong Chee Weng) was a debt due by the surviving partners, the claim is barred by Limitation".

"2. If not, the claim amounts to an account of dissolved partnership, which is also barred by Limitation".

"3. And in any case, if it is not a debt due by the surviving partners, the estate of a deceased partner may not prove in competition with the creditors of the firm".

In view of the doubts which the Assistant Official Assignee seems to have entertained as to the precise nature of the Appellant's claim, it will make for clarity if I deal with that point first of all.

For the Appellant Mr. Shearn contended that the claim was for a debt due by the surviving partners of the Chop Cheong Tuck firm, and for a sum certain; not for an account. He pointed out that the Assistant Official Assignee did not issue any notice to the Appellant under Rule 182 of the Bankruptcy Rules 1921 requiring further evidence in support of the claim, and that the facts set out in the Appellant's affidavit of the 13th of October 1937, in support of his notice of motion of appeal, have never been traversed or questioned in any way. Mr. Farr, who appeared for the Assistant Official Assignee, admitted that the Appellant's claim was against the surviving partners of the Chop Cheong Tuck firm, but suggested that it was, in reality, a claim for an account of the accumulated profits of the firm at the time of the deceased's death and of the amount due to him in respect of his share therein. Had the Assistant Official Assignee raised any question as to the total amount of those accumulated profits, or as to the deceased's share of the same, I should probably have agreed with Mr. Farr; but in the absence of any such question, and in the presence of an undisputed claim for a specific sum which is supported by evidence both adequate and uncontradicted, I cannot see that there is any answer to Mr. Shearn's contention. I therefore hold that the Appellant's claim is for a debt due by the surviving partners and for a sum certain, and not for any account.

Having thus decided the precise nature of the Appellant's claim, I will pass on to consider whether a suit to enforce it, instituted on the same date as the proof was filed, i.e., the 22nd of December 1936, would have been liable to dismissal on the ground that the limitation period applicable thereto had expired, provided that limitation were set up as a defence: see S.3 of the Limitation Enactment. For the purposes of this question I am assuming that a claim in respect of which the prescribed limitation period has expired is not a debt "provable in bankruptcy" within the meaning of Section 35 (iii) of the Bankruptcy Enactment, though it will appear, later on, that Mr. Shearn has put forward a most interesting and ingenious argument to the contrary.

In considering this question of limitation it is necessary to ascertain, first of all, exactly what period of time has run against the Appellant's claim. Fortunately that calculation offers no difficulty, as learned counsel on both sides are agreed:

(1) that time did not begin to run against the Appellant until he took out Letters of Administration of his deceased father's estate on the 3rd of May 1930, and

(2) that time ceased to run against him as soon as the Receiving Order was made on the 3rd of May 1935. Thus, the period during which time ran against him in respect of his claim for $12,575.09, as the legal personal representative of his deceased father, appears to be exactly 5 years.

Next I have to decide which article in the Schedule to the Limitation Enactment applies to this claim, and that is by no means so easy a question to answer. Mr. Shearn contends that Article 97 is the only Article which can apply to this claim on the evidence before me, whilst Mr. Farr suggests that Article 46, or 86 or 94 applies thereto. It will be convenient, therefore, to tabulate these Articles before I proceed to deal with them in detail.

THE SCHEDULE.

Description of suit	Period of Limitation.	Time from which period begins to run.
46. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
86. For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution.
94 For compensation for the breach of any contract, expressed or implied, not in writing and not herein specially provided for.	Three years	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.
97. Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years	When the right to sue accrues.

From this table it will be seen that if anyone of the Articles suggested by Mr. Farr is held to be applicable to the Appellant's claim, then time has run against it; whereas if Mr. Shearn's contention is upheld, the Appellant's claim is not barred by lapse of time.

Taking Mr. Farr's suggestions first, I feel very little hesitation in holding that Article 46 cannot apply because, in my opinion, there is nothing in the nature of such an account stated, as is referred to in that Article, in this case. So also, in regard to Article 86, since I have already decided that the Appellant's claim is not a claim for an account and a share of profits, but for a sum certain due by way of debt, I must hold that Article cannot apply here. These decisions bring me to Article 94, and that Article has caused me some difficulty.

In support of his argument that Article 94 is the one applicable to the Appellant's claim Mr. Farr cited two passages from a recent publication on the Indian Law of Limitation and Prescription by a Mr. Obhrai. I have certainly no intention of belittling the learned author by describing his two exhaustive volumes as a recent publication, and I hasten to add that his work appears to have been very favourably reviewed in India. All that I intend to convey by the expression "recent publication" is that some of the learned author's conclusions may require modification in the course of time.

To understand the two short passages on which Mr. Farr relies, and which I am about to quote, it is necessary to explain that our Limitation Enactment is modelled on the Indian Limitation Act of 1908, and that many of the Articles in the Schedule to our Enactment are word for word, or almost word for word, the same as Articles to be found in the corresponding Schedule of the Indian Act. Thus, but for one word which is immaterial for the purposes of this judgment, our Article 94 corresponds to the Indian Article 115, and our Article 97 is precisely the same as the Indian Article 120. And now for these two short passages. I have not got Mr. Obhrai's book before me, but according to my notes of the argument, these are as follows:—

> Volume II p. 1673. "Article 115————is not limited to the case of damages for breach of contract, and it is applicable to a case of liability under a simple debt due".
>
> Volume II p. 1745. "It (i.e. Article 120) should be applied only as a last resort, if no other Article is applicable. The more particular and specific Article ought to be regarded as the one governing the case.

With the last of these passages I need only express my respectful agreement, but the first of them seems to me to go rather further than is justified by the cases cited in its support, namely *Sreenath Roy v. Peary Mookerjee,* 21 C.W.N. p. 479; *Parbaticharan v. Ramnarayan,* 5 Bengal L.R. p. 396, and *O Koor Persaud v. Foolkomaree Daubee,* 10 Bengal L.R. p. 15. In all those cases, as I understand them, the suit was based on the breach of a contract, express or implied, though the claim was for a sum certain and not for damages; but "liability under a simple debt due" may surely arise otherwise than by breach of contract, for example, by the debtor's acts or by operation of law, and Mr. Obhrai's proposition is expressed in terms wide enough to include such cases.

According to the plain words used in the Article itself—I am referring to our Article 94 and the Indian Article 115—it applies only to suits "for compensation for the breach of a contract, expressed or implied, not in writing.....", and to hold that it is equally applicable to cases of "liability under a simple debt due", which may have nothing whatever to do with any kind of contract, seems to me to involve an act of considerable mental violence to the language employed. To take a very simple case, let us suppose that A. finds a purse in the street containing $100 and B's visiting card. B. claims the $100, and as he can prove that the purse and its contents are his, I imagine that there is a "simple debt due" from A. to B. for which B. can sue A. Could it, then, be successfully contended that our Article 94 is applicable to a suit by B. against A. for that $100? Presumably it could be so contended if Mr. Obhrai's proposition is 100 per cent sound, even though it is perfectly clear that there never was any contract of any kind between A. and B. in relation to the $100 found by the former on the pavement.

It seems to me, therefore, and so I hold, that there must be some contract expressed or implied, not in writing, and a breach thereof, before Article 94 in the Schedule to our Limitation Enactment can be invoked and applied. No doubt there was some kind of contract between the Appellant's deceased father Leong Chee Weng and the latter's partners providing for the division of the firm's profits amongst themselves, but (a) there is no evidence before me to show whether that contract was or was not in writing, and (b) it came to an end when Leong Chee

Weng died on the 22nd of October 1922, after which date any sum due from the surviving partners to the deceased's legal personal representative was nothing else than an ordinary debt. The result appears to be doubly fatal to Mr. Farr's argument since Article 94, in my view, only applies to cases where there is a contract and that contract is "not in writing". Even if it could be established, contrary to my view, that the Appellant's claim arises out of a breach of contract between those persons who constituted the partnership firm of Chop Cheong Tuck immediately prior to Leong Chee Weng's death, yet there is no evidence before me to show that that contract was not in writing; and if my own judgment in another matter arising out of the Chop Cheong Tuck bankruptcy can be regarded as evidence in this case, it would seem to be rather more likely than not that the contract now under reference was in writing. However, I need not labour this point further, since the onus of proving that Article 94 is the Article applicable to the Appellant's claim rests upon the Respondent who contends that it is. In my opinion there is a complete absence of any such proof, and Mr. Farr's contention on that point consequently fails.

From the foregoing discussion of Articles 46, 86 and 94, it seems to me that Mr. Shearn's contention has been established by a process of elimination. In other words, there is no period of limitation specially provided in the Schedule to our Limitation Enactment for a suit to enforce a claim like the Appellant's claim in this case, and therefore the Court must fall back on the omnibus Article 97 which applies to suits for which no period of limitation is provided elsewhere in the Schedule, and which has been applied in India to a suit for an ordinary debt: see *A. V. G. Rama Seshayya v. S. T. Cotton Press, Bezwada,* A.I.R. 1926, Madras p. 615. During his argument Mr. Shearn mentioned Articles 39, 41 and 42, and hazarded an opinion that it might, conceivably, be suggested that one of them applied "though one has only to read them to see that none of them can apply". As Mr. Farr did not make any such suggestion, I do not feel that there is any need for me to deal in detail with these articles. I am in agreement with Mr. Shearn's remarks that "none of them can apply".

In the result I hold that Article 97 of the Schedule to the Limitation Enactment applies to the Appellant's claim, and since it is admitted that a period of 5 years only has run against it, his claim is not barred by that length of time.

This decision of mine on the limitation question is sufficient to determine this appeal in favour of the Appellant. I will, however, deal with Mr. Shearn's other argument that claims against which a limitation period has run are nevertheless provable in bankruptcy in the F.M.S. in view of the proviso to Section 3 of the Limitation Enactment. The point he has raised in that respect appears to have escaped judicial determination hitherto, and to be of considerable public importance. Moreover, if this matter should go to a higher Court and my opinion upon the limitation question be held to be wrong, it will be necessary to decide for or against Mr. Shearn's argument on this point.

In order to make that argument intelligible it is necessary to set out in full sub-sections (i), (ii) and (iii) of Section 35 of the Bankruptcy Enactment, and the material provisions of Section 3 of the Limitation Enactment. Sub-sections (i), (ii) and (iii) of Section 35 of the Bankruptcy Enactment read as follows.

"35. (i) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy".

"(ii) A person having notice of any act of Bankruptcy available against the debtor shall not prove under the receiving order for any debt or liability contracted by the debtor subsequently to the date of his so having notice."

"(iii) Save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy".

The material provisions of Section 3 of the Limitation Enactment are these:—

"3. ..... every suit instituted after the period of limitation prescribed therefor by the Schedule hereto shall be dismissed, provided that limitation has been set up as a defence".

From a perusal of Section 35 (iii) of the Bankruptcy Enactment it will be seen that, with

certain exceptions which are not applicable to the facts of this case, "all debts and liabilities, present or future, certain or contingent, to which a debtor is subject at the date of the receiving order, shall be deemed to be debts provable in bankruptcy". It will also be appreciated that, by virtue of the terms in which Section 3 of our Limitation Enactment is expressed, limitation is not a defence to a suit instituted after the period of limitation prescribed therefor has expired, unless that limitation is set up as a defence. Founding himself upon these provisions of our Statute Law, Mr. Shearn argues that a debtor remains "subject to" a debt or liability, even though time has run against it, because it can be enforced against him by a suit at law unless he specially pleads limitation as a defence.

Mr. Shearn admits that debts against which time has run are not provable in bankruptcy in either England or India, but points out that the provisions of the English and Indian Limitation Acts in regard to the effect of the expiry of the relevant limitation period are very different from Section 3 of our Limitation Enactment. Thus, Section 3 of the English Limitation Act of 1623 provides that all the suits therein mentioned shall be commenced within 6 years next after the cause of action "and not after". The English Judges have interpreted these words as forbidding the bringing of an action after the expiration of the six years limitation period, and thus leaving the creditor no remedy whatsoever in respect of a debt against which time has run: see *exparte Dewdney,* 33 E.R. p. 836 and at p. 843, *Knox v. Gye,* 5 English and Irish App. Cas. p. 656 and at p. 672, and *Noyes v. Crawley,* 10 Ch.D. p. 31 and at p. 38. The material provisions of the Indian Limitation Act, on which our Limitation Enactment is modelled, do not expressly forbid the institution of a suit after the relevant limitation period, but do expressly provide that such a suit "shall be dismissed although limitation has not been set up as a defence": see S. 3 of tthe Indian Limitation Act of 1908. It is interesting to contrast these words, "shall be dismissed although limitation has not been set up as a defence", with the words used by the Colony and F.M.S., draftsmen in the corresponding section in our Colony Ordinance and F.M.S. Enactment, viz:—"Shall be dismissed provided that limitation has been set up as a defence". It is quite clear that a different meaning and effect must be attributed to such very different provisions.

The point thus raised by Mr. Shearn does not appear to have been judicially determined either in the F.M.S. or the Straits Settlements, though I am told that in an unreported case at Kuala Lumpur—in *re K. Arumugam,* Bankruptcy No. 46 of 1936—it was assumed that the debts against which time has run are not provable in bankruptcy in the F.M.S. The same assumption seems to have been made in the Colony, for there is a passage in the judgment of Earnshaw J. in *re Chop Teng Hak,* 13 S.S.L.R. p. 48, in which, whilst holding that the Limitation Ordinance 1896 did not apply to the claim then before him, he adds "it is quite true that debts barred at the date of the receiving order by the Limitation Ordinance are not provable". I myself do not regard either of these two cases as a judicial determination of the point, since it does not seem to have been argued in either of them. It seems to me, therefore, that I am free to express my own opinion on it.

My own opinion, then, is that Mr. Shearn's contention is sound, and that the Appellant's claim is a debt provable in the bankruptcy of Chop Cheong Tuck even if, contrary to the view I have already expressed, time had run against it at the date of the receiving order. It seems to me that in the F.M.S. a debtor remains "subject to" a debt even though time has run against it under the Limitation Enactment, because he can be sued at law for it, and judgment will be given against him in that suit unless he himself sets up limitation as a defence. There is no compulsion on such a debtor to set up limitation as a defence, and there must be many cases in which an honest man would resolutely decline to do so. In this connection it may be mentioned that in England an Executor is usually entitled to pay a debt barred by the Limitation Acts, and is sometimes obliged to retain such a debt when it is due from a beneficiary under the will; and the Courts in England certainly insist on an Executor being strictly honest in his dealings with his testator's estate. Mr. Shearn went so far as to suggest that it is not any part of the duty of an Official Assignee in the F.M.S. to raise a limitation plea, since he deals with all creditors' claims in a *quasi-judicial* capacity and not as though he were the Defendant in a law suit. The suggestion is certainly an interesting one, but as I have come to the conclusion that in the F.M.S. a debtor remains "subject to" a debt against which time has run, until he pleads limitation as a defence to an action to enforce payment of it, I should only be piling Pelian upon Ossa in the shape of *obiter dicta* were I to hazard an expression of opinion thereon. One *obiter dictum* may well be regarded as sufficient for any one judgment, and on both the grounds argued before me by Mr. Shearn I have come to the conclusion that this appeal succeeds

and that the Appellant is entitled to his costs of the same.

Appeal allowed.

From the above decision the Official Assignee preferred an appeal to the Court of Appeal. The appeal was heard before Roger Hall, C.J., McElwaine, C.J. (S.S.) and Murray-Aynsley, J.

H. D. Mundell (*G. Terrell* with him) for the Assistant Official Assignee.

E. D. Shearn (*M. N. Cumarasami* with him) for the creditor respondent.

Mundell.—In the Federated Malay States "Statute barred" debts are not provable in Bankruptcy.

Section 3 of the Limitation Enactment was intended to enact law similar to that obtaining in England under the Statutes of Limitation relating to personal actions, as administered by the English Courts. Although the English Statutes in general provided that actions must be brought before, and not after, a specified period, it was never held that an action founded on a "statute barred" debt could not be instituted—In England a creditor always could, and still can, sue for a "statute barred" debt *Dawkins v. Penrhyn* L.R. 4 A.C. 51, 59, 64—66. Those dicta which appear to be to the contrary effect, in cases such as *Knox v. Gye* (1872) L.R. 5 H.L. 656, *Noyes v. Crawley* 10 C.D. 31, applied to different circumstances, because in such cases the Statute had in effect been pleaded.

In England the Statute barred the remedy by preventing the maintenance (not the institution) of the action, and almost from the time when the Statute first came into operation unless limitation was pleaded, the provisions of the statute were ignored *Brown v. Hancock* 79 E.R. 701, *Thursby v. Warren* 79 E.R. 738, 739, *Trankersley v. Robinson* 79 E.R. 742, *Stile v. Finch* 79 E.R. 932, *Hawkins v. Billhead* 79 E.R. 951, 952. If the Statute was not pleaded, or set up by demurrer or answer, it could not be relied on at the trial *Rock v. Callen* (1848) 6 Hare 531, 67 E.R. 174, and it could not ordinarily be added as a defence by amendment at the trial *Aronson v. Liverpool Corporation* (1913) 29 T.L.R. 325.

When in *Exparte Dewdney* (1809) 15 Ves 479, 33 E.R. 836 Lord Eldon held that "statute barred" debts could not be proved in Bankruptcy, the test he applied (see p. 843 of the English Reports) was whether, when bankruptcy supervened, the Creditor could by legal action (or equitable suit) have compelled payment of his claim.

A debtor is "not subject" to a claim, unless the creditor can compel payment thereof by legal action, and he cannot if the case is one in which the debtor can plead limitation.

In any claim brought against a Bankrupt's estate the duty of the Official Assignee is to consider the defence of limitation, if available to the Bankrupt at the time of the Receiving Order; in every such case there has been a statutory order for administration of the Bankrupt's estate, and the Official Assignee is a Receiver. See sections 9, 48 (ii), 53, 54, 66 (i) and (ii) of the Bankruptcy Enactment. See also *Shewen v. Vanderhorst* (1831) 1 Russ and Nyl. 347, 39 E.R. 134, See also *Moodie v. Bannister* (1859) 4 Drew. 432, See also *In re Wenham* (1892) L.R. 3 Ch. 59, *In re Fleetwood &c. Syndicate* L.R. 1915 1 Ch. 486. As to the Official Assignee's duties in connection with proof of debts, see *In re Van Laun* (1907) L.R. 2 K.B. 23—31.

In the present case, the proof of debt was for the deceased partner's share of capital and profits in Chop Cheong Tuck.

A partner cannot claim a share of any specific asset of the firm—his only right is to have an account taken, and after payment of the debts &c. of the firm, to payment of the amount found due in respect of his share *Re Bainbridge* 8 Ch. D. 218. The creditor, as representative of a deceased partner, has no greater rights—He cannot (except in a suit for an account) claim a share of the assets, moveable or immoveable, in the possession of the firm at the time of the death of the deceased partner *Nihal Devi v. Kishore Chand* 8 I.C. 999, *Gobardhan v. Haneshi Lal* 11 I.C. 288, *Amir Chand v. Jawakir Mal* 32 I.C. 853, *Nir Ahmad v. Abdul Hamid* 30 All. 279. Nor can he, unless accounts have been taken, claim a share in an asset which the surviving partners reduce into possession after the death of the deceased partner *see Gopala Chetty's Case* L.R. 1922, 1 A.C. 488.

In this case the claim raised by the affidavit of the Representative of the deceased partner does not correspond with the claim made in the proof of debt, it is not for a share of the capital and profits, *i.e.* not for a share of assets, but for a share of a liability of the firm, a liability alleged in respect of past undivided profits; it cannot be claimed except by taking an account as on the death of the deceased partner. No such account was taken, and although at the date of the death of the deceased partner, a debt might have been due to his estate by the surviving partners, the amount of that debt was not then, and has not since been, ascertained.

The amount of that debt could only be ascertained either

(1) by taking an account, in which case Article 86 applies, and the suit is time barred, or

(2) by agreement between the surviving partners and the representative of the deceased partner, without the taking of an account.

It may be argued that there was such an agreement; it is submitted that the evidence as a whole does not support this argument, but if it be held to do so, no question of limitation arises *see Nand Lal v. Pertab Singh* A.I.R. (1922) Lahore 425, *Rochi Ram v. Faizullah Khan* A.I.R. (1933) P.C. 120.

Shearn.—The Limitation Enactment has no application to a debt to be proved in bankruptcy. The words in section 35 (iii) of the Bankruptcy Enactment are, "to which the debtor is subject at the date of the receiving order." "Subject to" is synonymous with "being under a liability for" (*In re Button Ex parte Haviside* (1907) 2 K.B. 180). In the Federated Malay States a debt is a liability until a defence under the Limitation Enactment has been set up. Debts cannot be statute barred in the Federated Malay States. The English Limitation Enactment 1623 provides a statutory bar against actions being brought after the statutory period and operates automatically before any step is taken by the Defendant. *Aliter* in the Federated Malay States. A claim after the Statutory period is forbidden in England. (*Knox v. Gye* 5 H.L. 656). The point can be taken on demurrer in England (*Noyes v. Crowley* 10 Ch. Div. 31, *Trankersley v. Robinson* 79 E.R. 742, *Dawkins v. Penrhyn* 4 App. Cas. 51). The English Rule that the defence must be pleaded is a rule of pleading only. (See R.S.C. 19 r. 15). The reason is so that the plaintiff cannot be taken by surprise and is given an opportunity to take himself out of the statute. (*Roch v. Callen* 67 E.R. 1274). In England the onus lies on the plaintiff to take his case out of the statute if it is pleaded (11 *Odgers'* Practice and Pleadings 307; *Wilby v. Henman* 149 E.R. 924). This cannot be under Federated Malay States Enactment. The reason why in England the onus of proof is on the plaintiff is because the suit is forbidden after the statutory period. In England there is no liability in Bankruptcy for Statute barred debt because the creditor at the date of the receiving order could not by legal action have compelled payment (*Ex parte Dewdney* 33 E.R. 836). In the Federated Malay States at the date of the receiving order a creditor can compel payment by legal action and will succeed in doing so unless the defence is set up. At the date of the receiving order no defence had been set up and no remedy was automatically barred by any Enactment. The question of limitation arose subsequently to the receiving order.

It is not competent for the Official Assignee to set up a defence. He is in a *quasi-judicial* capacity so far as the admission or rejection of proofs is concerned and from his decision there is an appeal. (See Bankruptcy Enactment 2nd Schedule paragraph 26 and Bankruptcy Rule 181). In England no question arises as to whether a trustee in Bankruptcy can set up a defence because the bar is automatic under the Statute. For this reason *Shewan's case; In re Wenham;* and *In re Fleetwood Syndicate* have no applicability. They show merely that in England the trustee in Bankruptcy should take cognisance of the bar created by Statute but are not authority on the point as to whether the Official Assignee can set up a defence.

If the Limitation Enactment is applicable then,

(1) Article 86 does not apply because the creditor claimed a specific debt, and there is no article other than 97 which applies in such a case.

(2) If Article 86 does apply the claim was acknowledged by the Balance Sheet exhibited to the 2nd Affidavit.

(3) If the claim is a claim for an account, as the Official Assignee has failed to show that the partnership agreement was a verbal contract Article 95 applies.

(4) There was an agreement to pay a specific sum which is proved by paragraph 10 of the first Affidavit of the Creditor.

With regard to Argument (1) the Court must decide on the evidence before it. The Official Assignee never challenged the Creditor's figures. His duty is set out in Rule 26 in the Second Schedule to the Bankruptcy Enactment, and he never issued any notice under Rule 182. Article 86 does not apply because,

(1) This is not a suit for an account.

(2) The Creditor claims a specified sum and not an unascertained share of profits.

(*Nandlal v. Pertab Singh* A.I.R. (1922) Lahore 425) Money left in a firm is a debt accruing at the date of the dissolution (6th Edition *Pollock & Mulla's* Law of Contract 722).

As regards argument (2) the Balance Sheet given in the year 1932 is a sufficient acknowledgment for the purposes of section 18 (i) of the Limitation Enactment.

As regards argument (3) the point is covered by authority (See *Kwong Yik (Selangor) Banking Corporation Ltd. v. Malayan Daily Express (1926) Ltd. and ors.* (1933) F.M.S.L.R. 51; 2 M.L.J. 198 and *Tricomdas Cooverji Bhoja v. Gopinah Jin Thakur* I.L.R. 44 Cal. 759.)

As regards argument (4) the Court must accept the evidence which has never been challenged or disputed.

Mundell in reply.—Although the words of the English Statute of Limitations appear to prohibit the institution of a suit after the expiration of the limitation period, as construed by the English Courts they do not prevent such institution—in England there is no automatic bar to the bringing of a suit in respect of a statute barred debt at the expiration of the limitation period, and for practical purposes the position is the same as in the Federated Malay States.

The words "unless limitation be set up as a defence" are not words of art.

There is no reason why in the Federated Malay States the plea of limitation should not be raised as a point of law under Rule 31 of the Supreme Court Rules—In *Meyappa Chitty v. Supramanian Chitty* (1916) A.C. 603 a case from the Straits Settlements, this was done, and in England the practice is now similar.

As regards limitation, the onus in England is only on the Plaintiff if limitation has been pleaded.

In every case of claim against the estate of a Bankrupt, the Official Assignee is bound to consider every defence which might have been available to the Bankrupt at the date of the Receiving Order.

The fact that prior to the Receiving Order there has been no suit, and limitation has not been set up as a defence, does not alter the duty of the Official Assignee to consider limitation as a defence. In order to apply the test laid down in *Ex parte Dewdney,* he must (both in England and the Federated Malay States) assume a suit between the Creditor and the Debtor, in which the Defence of limitation has been set up. The Official Assignee does not himself raise the Defence—he assumes that the Debtor would have done so, if the Creditor had, by legal action, sought to compel payment.

The defence is not raised after the Receiving Order—the Official Assignee assumes it to have been raised before, because it was available before.

As to the Article applicable in the present case, if (which is not admitted) there had been any debt due to the Applicant when in 1930 he obtained administration, and if the amount of such debt had been then ascertained, Art. 94 (Indian Article 115) would apply. Although *Nand Lal's case (supra)* shows that the law in India is different from English law, there is no reason why in the Federated Malay States an obligation or contract to pay should not be implied in respect of a debt due, and Art. 94 is a general article applicable to cases by breach of implied contracts, and should be applied in preference to Article 97.

As to the alleged acknowledgment, the 1932 Balance Sheet is not an acknowledgment within the meaning of section 18 of the Limitation Enactment. It does not prove itself, and there is no evidence that it was signed by any person authorised on behalf of the firm, or that any such person gave it to the claimant.

Art. 95 does not apply to the case. Even if it be assumed that the partnership agreement was in writing, there is no evidence that it created any privity of contract between the representative of the deceased partner and the surviving partners or that the former could have founded any claim under its provisions. In the absence of such proof, Article 86 applies.

The Balance Sheet in no way corroborates the agreement alleged between the Applicant and the Managing Partner; the evidence does not show that the latter had anything to do with it.

Hall, C.J.—In the Court below the learned Judge reversed the decision of the Official Assignee who had rejected a proof of the respondent, as administrator of the estate of his deceased father, Leong Chee Weng, against the bankrupt partnership firm of Chop Cheong Tuck for the sum of $12,575.09, being the deceased's share of capital and profits in the firm.

Deceased was one of the original partners in the firm, and he continued to be a partner therein until he died on October 22nd, 1922. It is alleged that about that time there was an item of $326,952.43 in the firm's books standing to the credit of nett accumulated profits, and the claim herein was in respect of 6 out of 156 shares amounting to the aforesaid sum of $12,575.09, deceased having con-

tributed $600 of the capital $15,600. The receiving order was made on 3rd May 1935.

On the argument and the evidence before him, the learned Judge held that the respondent's claim was for a debt due by the surviving partners and for a sum certain, and that Article 97 of the schedule to the Limitation Enactment applied to the respondent's claim; and since it was admitted that a period of 5 years only had run against it, the claim was not barred by length of time. The learned Judge also found as follows:—

> "My own opinion, then, is that Mr. Shearn's contention is correct, and that the appellant's (now respondent's) claim is a debt provable in the bankruptcy of Chop Cheong Tuck even if, contrary to the view I have already expressed, time had run against it at the time of the receiving order".

When this appeal was opened before us, the attention of the Court was drawn to the fact that, although the affidavit of the respondent sworn on 17th January, 1938, (appearing on page 43 of the record of appeal) had not been admitted in the Court below, yet its contents had been referred to in the judgment of the learned Judge in that Court, and had been incorporated in the order of 28th January 1938. In such circumstances, it was decided that either the affidavit in question must be considered as being before the Court of Appeal or there must be a fresh trial. Counsel for both parties agreed to the former course, so that the case took on a very different aspect before us. The evidence before us, then, consisted of the affidavit already referred to with exhibits thereto, an affidavit of respondent sworn on the 13th of October 1937, and some cross-examination of respondent at the hearing below as to the delay in filing his proof.

In his affidavit of 13th October 1937, respondent swore that in August, 1932, after his return to Malaya, he applied to one Foong Tan Theng, the managing partner of the firm, for payment of the sum of $12,575.09, the subject-matter of the proof of debt, and on the latter's explanation of the then financial state of the firm and on his promise that the firm would pay the money in two years' time, he (respondent) agreed to give the firm two years' time to pay. Respondent, further, swore that Foong Tan Theng gave him a letter acknowledging indebtedness of the said sum of $12,575.09, but that the said letter was mislaid. In or about August 1934, respondent, according to the affidavit, again applied for payment, but was put off by promises to pay. Foong Tan Theng left the country in October, 1934. On his departure, one Foong Kah Yu, then a leading member of the firm, assumed the management of the firm, and promised to pay the sum of $12,575.09 in a short time; meanwhile, as already indicated, on 3rd May 1935, a receiving order was made against the firm.

To the affidavit of the 17th January 1938 was exhibited a so-called balance-sheet for 1923 showing "profits for past years $326,952.43". This document was given to respondent by the son of one of the partners in the firm. This sum was treated as a liability of the firm.

There was also exhibited to the last mentioned affidavit, a so-called balance-sheet for 1922, purporting to be signed by the aforesaid Foong Tan Theng on the 18th October 1932. It is addressed to Leong Chee Weng, or at any rate, the name of Leong Chee Weng appears amongst the headings to the document. The document is also chopped with the correspondence chop of "Cheong Tuck Ipoh". This document showed under the heading 'Liabilities'—"Actual profits after deducting profits to shareholders—$326,952.43".

Further, in the second affidavit, it was shewn that deceased had 6 out of 156 shares in the firm.

It must be borne in mind that there was no evidence of any kind whatsoever in opposition to the two affidavits and the exhibits thereto filed by the respondent. Both Foong Tan Theng, the managing partner of the firm, and Foong Kah Yu, who subsequently managed the business, agreed, according to the evidence available, that the sum certain of $12,575.09 was due to the estate of Leong Chee Weng, whilst the document signed by Foong Tan Theng on 18th October 1932, is a written confirmation of indebtedness of the amount set out therein to the partners.

It is true that deceased died on 22nd October 1922, and the figures in the exhibit are, presumably, for the whole English year; but this may well have been a matter of arrangement between the parties. At any rate, there is nothing to the contrary.

Mr. Mundell, for the appellant, admitted that if the Court accepted the evidence which has been referred to *supra*, he could not further contend that limitation applied, but submitted that the Court should not accept such evidence. The evidence, however, is there and is uncontradicted. Two managing partners admit that the sum of $12,575.09 was due to the estate of the deceased, and the managing partner Foong Tan Theng confirmed in writing a total sum of

$326,952.43 as due. It has further been shewn that deceased had 6 out of 156 shares in the firm, and these 6 shares amount to $12,575.09, being a proportionate share of $326,952.43.

There is no reason apparent why we should refuse to accept the uncontradicted evidence before us, and once such evidence is accepted, no question of limitation can arise as Mr. Mundell conceded.

The appeal must, therefore, be dismissed with costs.

McElwaine, C.J. (S.S.)—This is an appeal from the judgment of Aitken, J. reversing the Official Assignee who rejected a proof of Leong Cheong Wai in the bankruptcy of Chop Cheong Tuck.

The respondent is the administrator of his father Leong Chee Weng, deceased, and he claimed in the bankruptcy that Chop Cheong Tuck (hereinafter referred to as the firm) was indebted to the estate of Leong Chee Weng in the sum of $12,575.09 for the deceased's share of capital and profits in Chop Cheong Tuck.

Leong Chee Weng had been a partner in Chop Cheong Tuck up to the date of his death on 22nd October, 1922.

The capital of the firm at that date was $15,600 of which Leong Chee Weng contributed $600. But it is alleged that at the end of the year 1922 there were in the firm net accumulated profits of Chop Cheong Tuck amounting to the sum of $326,952.43, the property of the partners, and that of this sum $12,575.09 belonged to the deceased partner Leong Chee Weng.

The partnership agreement was not produced so the partnership was deemed to have dissolved on the death of Leong Chee Weng but the remaining partners appear to have carried on the business (whether with new partners or not, we do not know) until the date of the bankruptcy, thus constituting themselves a new partnership.

For about twenty eight years during the period of thirty four years before the date of the Receiving Order (3rd May 1935) the respondent was an employee of the firm.

The other material facts deposed to may be concisely set out as follows:—

1. Leong Chee Weng died intestate in China on 22nd October, 1922, having no assets in the Federated Malay States other than his capital in the firm and his share of profits for many years deposited in the firm for safe keeping.

2. The firm did not wind up its business on the death of Leong Chee Weng but continued business and the partnership account until the receiving order was made.

3. An unsigned "balance sheet" for 1923 was exhibited. This showed liabilities to partners only, and contained an item "Profits from past years $326,952.43."

4. This "balance sheet" was lent to the respondent in 1929.

5. Between 1922 and 1930 no steps were taken by the respondent to recover his father's money from the firm.

6. On 3rd May 1930 Respondent obtained letters of administration to Leong Chee Weng's estate and paid estate duty on $12,575.09.

7. No demand for the money appears to have been made by respondent until August 1932 when he applied to Foong Tan Theng, the managing partner of the firm for payment of $12,575.09 when Foong Tan Theng explained the financial state of the firm and on Foong Tan Theng's promise that the firm would pay in two years respondent agreed to give the the firm two years' time to pay. It was sworn that Foong Tan Theng gave a letter acknowledging the debt but this was not produced; so this acknowledgment remains a verbal one.

8. A "balance sheet" for 1922 purporting to have been signed by the managing partner Foong Tan Theng on 18th October, 1932, was exhibited. This also only shewed liabilities to partners and these included "actual profits after deducting profits to shareholders $326,952.43." How this balance sheet got into the respondent's hands is not stated.

9. The name of Leong Chee Weng appears on the "balance sheet" above the liabilities probably to indicate that he or his estate might be interested.

10. In no document were the accumulated profits apportioned but as Leong Chee Weng had 6 out of 156 shares in the firm his share was taken as being $12,575.09.

11. In August, 1934, Respondent asked Foong Tan Theng for the money which had been promised two years previously, but he put Respondent off, promising to pay and left the country in October.

12. After the departure of Foong Tan Theng, Foong Ka Yu, a leading member of the firm, assumed the management of the firm and promised to pay the said sum of $12,575.09 in a short time.

13. On 3rd May, 1935, a receiving order was made against the firm.

14. On 22nd December, 1936, he filed his claim in the bankruptcy for "value of deceased's (Leong Chee Weng's) share of capital and profits in Chop Cheong Tuck up to 26.10.22 $12,575.09".

    If the death was on 22.10.22, 26.10.22 would appear to be the wrong date, but no point was made of the discrepancy.

15. On 23rd September, 1937, the Assistant Official Assignee rejected the proof on the following grounds:—

    a. That if the share of the deceased partner was a debt due by the surviving partners the claim is barred by limitation.

    b. If not, the claim amounts to an account of dissolved partnership which is also barred by limitation.

The learned Judge saw "no reason to doubt that $12,575.09 was due from the partnership firm of Chop Cheong Tuck to the appellant's (now respondent's) father Leong Chee Weng at the time of the latter's death, and this sum became due from the surviving partners of the firm to the appellant (now respondent) in his representative capacity".

After giving careful consideration to the material before me, I think there was an agreement that Leong Chee Weng's share was $12,575.09. This is indicated by that sum being inserted in the petition for Letters of administration and also by the admission in facts 7 and 12.

But one must look at the reality of the matter. The documents which have been spoken of as "balance sheets" are not balance sheets at all. They profess to shew certain liabilities. I doubt if they shew all the liabilities. They certainly do not shew the assets out of which those liabilities are to be met. They are nothing more than a statement of hypothetical rights of the partners *inter se*. They do not shew or suggest that the $326,952.43 is a liquid asset or even that it exists. The capital is stated to have been $15,600 and the net profits for Yan Sut year $17,858.64. I cannot help thinking that the "accumulated profits" were used as capital.

What, then, is the real nature of this claim?

It appears to me to be a claim against the partners of the original firm who survived the late Leong Chee Weng, a claim against them as individuals and not against the new firm now bankrupt.

What is that right? It is not an absolute right to a sum certain independently of the existence of assets.

On a dissolution the partnership property must be applied in payment of the firm's debts and the surplus is divided among the partners. It is beside the point to say that because the partnership account shews each partner to be entitled to so much that he is therefore entitled to be paid that sum irrespective of debts, assets and other partners admitted shares.

If there were insufficient assets, the shares would abate perhaps to zero.

The deceased held 6 out of 156 shares in the partnership and the sum agreed to be due is 6-156ths. of $326,952.43, but there is no evidence that this latter sum existed in whole or a part or that if it did, the debts, when paid, would still leave this sum intact.

The remedy was, and is, an account in the taking of which the agreed sum of $12,575.09 is a factor and nothing more. Before that sum can be recovered, it must be shewn that the assets are or were sufficient to pay it with the other claims.

It is therefore a claim to which Article 66 in the Schedule to the Limitation Enactment applies if the Limitation Enactment is applicable at all.

As already mentioned Aitken J. reversed the Official Assignee's decision and ordered that the proof of debt be admitted, and from this Order the present appeal is brought.

I think that a claim like this, which, if allowed, will result in defeating to a considerable extent the ordinary creditors of the bankrupt firm, should be closely scrutinised.

Putting it at its highest, the claim is in the nature of an account stated and in my opinion an account stated between partners or between partners and the estate of a deceased partner is not conclusive of anything more than this, that the partner in whose favour the account is stated is entitled to an ascertained proportion of the net assets. It does not imply that the partnership was solvent much less that it could pay the partners their shares in full. To hold otherwise would be to open the door wide to fraud. An admission is not sufficient in bankruptcy proceedings. *In re a Debtor,* 51 T.R.L. 277; (1935) 1 Ch. 353.

As I have said, we are told nothing of the composition of the new firm. If this debt is due by the new partnership now in bankruptcy then it must be due as money had and received by the partners of the new partnership and the debt on this basis would be statute barred if the Limitation Enactment applies.

Mr. Shearn attempted to set up two acknowledgments in order to take the case out of the Enactment.

In the Court below Mr. Shearn is recorded as having dealt with fact No. 7 as follows:—

> "The claimant has not found the letter. I am therefore not basing argument on the alleged acknowledgment of indebtedness. Section 18 (ii) of Chapter 18."

I think Mr. Shearn was right and that the subsection prevents oral evidence of the contents of an unproduced written acknowledgment being given, for the purpose of taking the case out of the Limitation Enactment.

He raised this point in the Court of Appeal, though I do not think with great conviction.

I think this argument must be rejected not merely because it appears to me that the so called oral acknowledgment of August, 1932, is not an acknowledgment within section 18 of the Limitation Enactment but because argument upon it was disclaimed in the Court below.

Mr. Mundell argued that as acknowledgment was not argued below, it could not be argued on appeal, and he referred to *Banbury v. Bank of Montreal* (1918) A.C., 626. However general that rule may be it is not without exceptions. *Benaim & Company v. Debono* (1924) A.C., 514; *Nagoremull v. Triton Insurance Company, Limited,* 41 T.L.R. 168; *Bank of New South Wales v. O'Connor,* 14 App. Cases, 273; *Johnson v. Pickering: Norton Claimant* (1908) 1 K.B., 1; *Connecticut Fire Insurance Company v. Kavanagh* (1892) A.C., at 480.

But the admission of the affidavit of 18th October, 1938, before the Court of Appeal certainly entitles Mr. Shearn to found an argument on that affidavit which was not open to him in the Court below.

Mr. Shearn relies on fact No. 6—the "balance sheet" of 1922 signed by Foong Tan Theng, the managing partner on 18th October, 1932, shewing as a liability "Actual profits after deducting profits to shareholders $326,695.43" and bearing Leong Chee Weng's name. But this does not establish that the sum certain of $12,575.09 was due, even if it can be taken as an acknowledgment of indebtedness to the partners in general, though not of the precise amount due to any one partner.

Put at its highest and assuming that in 1932 Foong Tan Theng had authority to make an admission on behalf of the surviving partners of 1922 it is no more than an admission that certain profits were due to the partners: it is no evidence that the partnership was in 1922 able to pay, so this so-called "balance sheet" for the Chinese year Yan Sut is nothing more than a factor which might be useful if and when an account is taken.

No evidence was given as to when the Chinese Yat Sut year ended, whether on 31st December, 1922, or, as the Calendar shews, on 15th February, 1923, but in either case the "balance sheet" covers a period after the death of Leong Chee Weng.

A partnership is a contractual relationship, it is not, like an incorporated company, a person and in my opinion the personal debts of the old partners cannot be proved in the bankruptcy of the new partnership just because some of the old partners may be members of the new partnership.

If my view that this claim cannot be made in this bankruptcy is wrong, the claim is still a claim for an account and it remains to consider whether the Limitation Enactment applies to proofs in Bankruptcy.

It is agreed that if limitation is material, the limitation period commenced on 3rd May, 1930, when the respondent took out letters of administration and that time ceased to run on 3rd May, 1935, when the receiving order was made. Limitation Enactment sections 16 and 9.

Aitken J. accepted the argument that the claim was a debt provable in the bankruptcy even if time had run against it at the time of the receiving order.

It was admitted by Mr. Shearn both before Aitken J. and before the Court of Appeal that debts against which time has run are not provable in bankruptcy in England.

Mr. Shearn's argument was based on the wording of Section 35 (iii) of the Bankruptcy Enactment (Chapter 55) and of Section 3 of the Limitation Enactment (Chapter 16).

Section 35 (iii) of the Bankruptcy Enactment is as follows:—

> "Save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order ..... shall be deemed to be debts provable in bankruptcy".

Section 3 of the Limitation Enactment is as follows:—

> "Subject to sections 4 to 24, every suit instituted after the period of limitation prescribed therefor by the schedule shall be dismissed, provided that limitation has been set up as a defence".

The argument was that this is a debt to which the firm was subject and that the Limitation Enactment does not make a debtor cease to be subject to a debt. The Limitation Enactment, Mr. Shearn argued, does not bar the debt. He contrasted the words in section 3 of the Limitation Act 1623 "all actions of debt, governed upon any lending or contract without specialty ..... shall be commenced and sued within the time and limitation hereafter expressed, *and not after.*"

Those words "and not after" constitute, he contended, a bar which does not exist under section 3 of the Federated Malay States Enactment. "Statute barred" is a phrase commonly applied to claims against which time has run. "Barred" is not to be found in section 3 of the English Act but it does occur in section 5. "Barred" is not to be found in section 3 of the Federated Malay States Enactment but it is used in section 9. That section provides that "notwithstanding anything hereinbefore contained no suit against a trustee shall be barred by any length of time". The clear purpose of these words is to prevent such suits being barred by any of the earlier provisions of the Enactment including the provisions of section 3.

Having regard to the history of the practice of the English Courts since 1623, I do not think much stress can be placed on the words "and not after" which occur so frequently in the Act of James I. That Act contains no provision for acknowledgments or promises to pay taking a case out of the statute, but this had been grafted on to the statute by judicial decisions long before Lord Tenterden's Act 9 Geo. IV c.14, decisions, which, to quote Lord Sumner in *Spencer v. Hemmerde* (1922) 2 A.C., 522; 38 T.L.R., 869, "have been directed to what is after all the task of decorously disregarding an Act of Parliament", and which, he thought, commenced shortly after the Restoration.

Another rule which weakens the effect of these words "and not after" is the long settled rule of practice that limitation is not a defence unless it is pleaded. Mr. Mundell referred us to *Thursby v. Warren,* Croke Car, 159 (a case of 1630), *Thankersley v. Robinson,* Croke Car, 163; *Stele v. Finch* Croke Car, 381; and *Hawkins v. Billhead,* Croke Car, 404, as early illustrations of the rule that a defendant relying on limitation as a defence must plead the statute, and *Roche v. Collen* 6 Hare, 531 and *Aronson v. Liverpool Corporation* 29 T.L.R., 325 as more recent examples. See too English Order XIX r.15.

This rule of practice is incorporated in the Limitation Enactment, section 3 by the words "provided that limitation has been set up as a defence".

Mr. Shearn referred to *Knox v. Gye* L.R. 5 English & Irish Appeal Cases at page 672 and *Noyes v. Crawby* 10 Ch.D. at pages 36 and 38 as shewing that the English Act forbids the bringing of an action. In both these cases the statute was pleaded. To forbid an action to be brought and to direct that an action shall be dismissed if brought appears to me to be a distinction without a difference. It is not an offence to bring an action in England for a debt against which time has run. A plaintiff bringing such an action is exposed to no penalty save paying the costs of the suit, and the F.M.S. plaintiff in like case is liable to the same consequences.

I see no distinction of substance between the English section which enacts that all actions shall be commenced within the time and not after, and the local enactment which says that all suits instituted after the period of limitation shall be dismissed. Each bars the remedy, neither extinguishes the debt as possibly some foreign rule of limitation may do as contemplated in section 10 (2).

In my opinion the effect of section 3 of the Act of James I read in the light of English practice and of section 3 of the F.M.S. Limitation Enactment

is identical. Each bars the remedy, if and only if, the defendant chooses to plead the statute.

This is the basis of Mr. Shearn's argument that under section 35 (iii) of the Bankruptcy Enactment (which is identical with section 30 (3) of the English Bankruptcy Act of 1914 and with section 37 (3) of the Act of 1883) debts "to which the debtor is subject" include debts for which, if the debtor were sued, he could plead limitation.

Admittedly, a proof can be rejected in bankruptcy in England if the debt is statute barred; *Ex parte Dewdney,* 15 Ves., 479. *Williams* on Bankruptcy, 15th Ed., page 164.

In my opinion the Official Assignee in the Federated Malay States is entitled to reject a proof for a debt if the debtor, had he been sued, could have successfully pleaded the Limitation Enactment.

No other view appears to have been entertained in the Colony of the Straits Settlements where the law is identical so far as the sections mentioned in this judgment are concerned. In *Re Chop Teng Hak Ex parte Ng Heok Teck* 13 S.S.L.R., 48 Earnshaw J. said "it is quite true that debts barred at the date of the receiving order by the Limitation Ordinance are not provable".

This was perhaps an *obiter dictum* but I think it correct.

I am therefore of opinion that the Assistant Official Assignee was right in holding that this claim was for an account, and, not having been made within three years from the date of the letters of administration, is statute barred. I would allow the appeal.

Murray-Aynsley, J.—In this case the Official Assignee appeals against a judgment of Aitken J. admitting a proof in bankruptcy of a claim of the respondent.

The facts in this case are obscure, but the claim of the respondent appears to arise in the following way. The father of the respondent was for many years a partner in the firm, now bankrupt, known as Chop Cheong Tuck. From the extracts from the balance-sheet annexed to the second affidavit of the respondent, it is clear that this firm originally had a capital of $15,600 in 156 $100 shares, but each year a sum was retained out of undivided profits, and by the end of the year 1923 a figure of no less than $356,979.92 had been accumulated in this way. As the profits for the year 1923 were $34,816.09, it seems obvious that these undistributed profits must have formed the bulk of the trading capital of the concern. The father of the respondent died on the 22nd October 1922. The respondent took no steps to claim what might be due to his father's estate out of his interest in the firm, and did not take out letters of administration until May 1932. In August 1932 the respondent, according to his affidavit of 13th October 1937, approached one Foong Tan Theng, who was managing partner of the firm, and demanded the sum of $12,575.09 as representing his father's interest. This sum appears to be based *pro rata* on his father's interest, viz. 6 shares out of 156 in the sum of $326,952.43, which was shown in the balance-sheet for the year 1922 as being the total of undistributed profits at the end of that year. As the father died on October 22nd of that year, it is obvious that this could not have been an exact figure even under this heading; an exact figure could only have been arrived at by taking an account as at the relevant date. However, the respondent alleges that the said Foong Tan Theng agreed to pay the sum claimed in two years' time. As the respondent would be entitled to not only a share of the accumulated profits but also to a proportion of the assets (viz. 6/156) as at the date of his father's death, and as we have no material on which to base any estimate as to the probable value of these assets, it is not at all improbable that the parties may have agreed to such a figure on a compromise basis, to avoid the trouble and expense of taking an account.

On May 3rd 1935, a receiving order was made against the firm, and on December 22nd 1936 the respondent filed a proof for the said sum of $12,575.09, which was described in the proof as 'value of deceased's share of capital and profits in Chop Cheong Tuck up to 26.10.1922'. Actually we know that this figure was nothing of the sort, but was either the share of the deceased in the accumulated profits only on 31st December 1932, or else the sum agreed on by Foong Tan Theng in August 1932.

The proof of the respondent was rejected on 23rd September 1937 on the following grounds, viz:—

1. That if the share of the deceased partner was a debt due by the surviving partners, the claim is barred by limitation.

2. If not, the claim amounts to an account (sic) of dissolved partnership which is also barred by limitation.

3. And in any case, if it is not a debt due by the surviving partners, the estate of a deceased partner may not prove in competition with the creditors of the firm.

It may be mentioned here that the third ground appears to be based on a misapprehension, and no reliance appears to have been placed on it either in the Court below or on appeal.

The respondent appealed against this rejection of his proof, and on 13th October 1937, swore his first affidavit. On 17th January 1938 the respondent swore a second affidavit, which for technical reasons was not admitted, and in the absence of any affidavit in reply, the proceedings before Aitken J. were based on the first affidavit and on cross-examination of the respondent about his delay in filing his proof.

When the learned Judge had reserved judgment, it appears that the second affidavit was inadvertently included among the papers in the case, and from certain passages in the judgment it appears that the learned Judge must also inadvertently have referred to it. When the case came up on appeal, this difficulty was pointed out, and it was agreed between the parties that this second affidavit should be taken as being admitted.

This second affidavit puts such a different complexion on the claim of the respondent that the hearing on appeal took on the character of an hearing at first instance. Both here and below the contention between the parties was whether the claim of the respondent was barred by limitation, and a great deal of erudition was displayed in the efforts to find out what the appropriate period was.

Now primarily it seems clear that the remedy of the respondent as against the firm would have been to obtain an account, because it was only by an account that the amount due should be ascertained. But there was nothing to prevent the parties from agreeing on a sum, and if this were done, the necessity for an account could be obviated.

In paragraph 10 of the first affidavit it is alleged that such an agreement was made, and in the absence of any contrary affidavit there seems to be no reason why this Court should not find that such an agreement was in fact made, although curiously enough no importance seems to have been attached to it in the Court below. Once this agreement is accepted, difficulties about limitation disappear, because it is conceded that a claim based on this agreement would not be affected by limitation at the date of the receiving order. In view of this it appears to me to be unnecessary to express any opinion on the very interesting and ingenious contention of Mr. Shearn that the Official Assignee is bound in any event to admit proofs of debts to which a defence of limitation might have otherwise been raised.

In my opinion this appeal must be dismissed with costs.

Appeal dismissed.